No. 02-554

NOV 25 2002

In The
Supreme Court of the United States

JOHN D. ORR, BETTY E. SANFORD, FRANKIE L. MOORE, JIMMIE MARTIN, and NATHANIEL HENLEY,

Petitioners,

v.

AMERICAN HERITAGE LIFE INSURANCE COMPANY, FIRST COLONIAL INSURANCE COMPANY OF FLORIDA, and FIDELITY NATIONAL CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether an opinion of the Mississippi Commissioner of Insurance expressed in an affidavit obtained for litigation is sufficient to invoke reverse-preemption under the McCarran-Ferguson Act, 15 U.S.C. § 1011, and bar application of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et. seq.*, in the absence of any state law or statute prohibiting the arbitration of insurance-related disputes.

2. Whether signatories to an arbitration agreement knowingly waived the right to a jury trial, when they, among other things, signed an arbitration agreement directly above bold, capital, readily legible letters, which states in part that the signatory is "GIVING UP THE RIGHT TO A TRIAL IN COURT, BOTH WITH AND WITHOUT A JURY."

3. Whether Petitioners put the "making" of the arbitration agreement at issue when every defense Petitioners raise relates to the contracts as a whole.

4. Whether an arbitration agreement is unenforceable due to allegations regarding the potential cost of arbitration when the arbitration agreement: (1) incorporates the American Arbitration Association ("AAA") rules allowing the arbitrator to defer or reduce fees in the event of extreme hardship on the part of any party; (2) expressly provides that the lender will pay all arbitration fees and expenses for up to one day of the proceedings, excluding the initial $125 fee; (3) expressly provides that any other costs shall be paid by the non-prevailing party; and Petitioners have submitted no evidence that their ability to arbitrate will be impeded by the alleged costs of arbitration.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Respondents American Heritage Life Insurance Company and First Colonial Insurance Company are wholly owned by the Allstate Corporation.

The Allstate Insurance Company is publicly traded on the NYSE.

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BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents American Heritage Life Insurance Company and First Colonial Life Insurance Company (collectively "American Heritage") submit that the Petition for Writ of Certiorari ("Pet.") filed by Petitioners is due to be denied.

STATEMENT OF THE CASE

American Heritage respectfully advises this Court that the Petition distorts and mischaracterizes the facts of this case. In addition to the misstatements identified in the body of this opposition, Petitioners ignore the legal significance of the following undisputed facts:

- Each Petitioner obtained a loan or loans from Fidelity National Corporation ("Fidelity").
- Each loan included an arbitration agreement. That is, the arbitration agreements at issue were contained in loan documents, not in insurance contracts.
- Each arbitration agreement was presented on its own page with the title "**ARBITRATION AGREEMENT**" in bold, capital letters.
- Each Petitioner executed an arbitration agreement. Some Petitioners executed multiple arbitration agreements.
- Each arbitration agreement expressly stated that all claims arising from the loan or credit insurance purchased with the loan would be resolved through arbitration.

- Each Petitioner purchased credit insurance from American Heritage.
- Each Petitioner alleged civil conspiracy between American Heritage and Fidelity.

It is undisputed that Petitioners executed valid, enforceable arbitration agreements when obtaining multiple loans and purchasing credit insurance. These agreements explicitly refer any claim related to the solicitation and sale of credit insurance to arbitration. Despite having agreed to arbitrate their claims, Petitioners filed suit in the Circuit Court of Clay County, Mississippi seeking over $35 million in damages. In response, American Heritage and Fidelity were forced to file independent actions in federal court to enforce the arbitration agreements executed by Petitioners.

American Heritage takes particular issue with certain mischaracterizations made by Petitioners. First, Petitioners improperly refer to the arbitration agreements as "adhesion-type contracts." (Pet. at 2). Petitioners cannot support this blatant mischaracterization because the arbitration agreements expressly state that they are in consideration of Fidelity's extension of credit or loans to Petitioners. Additionally, the Fifth Circuit noted that the arbitration agreements at issue were in clear language and legible print. *American Heritage Life Ins. Co. v. Orr,* 294 F.3d 702, 705-706 (5th Cir. 2002). The court also noted that the agreements were not hidden and "directly above the date and signature lines, in bold, capital, readily legible letters, is the following language":

> **THE PARTIES UNDERSTAND THAT BY SIGNING THIS ARBITRATION AGREEMENT, THEY ARE LIMITING ANY RIGHT**

TO PUNITIVE DAMAGES AND GIVING UP THE RIGHT TO A TRIAL IN COURT, BOTH WITH AND WITHOUT A JURY.

Id. (emphasis in original). Second, the credit insurance sold to Petitioners has never been characterized as "unnecessary," nor have the premiums ever been proven to be "exorbitant" or "in excess of market rates." (Pet. at 3).

Finally, one of the most egregious mischaraterizations made by Petitioners is their assertion that the arbitration provision waives Petitioners' right to "collect punitive damages from the respondents." (Pet. at 11). This assertion is directly contradicted by the express terms of the arbitration agreement, which states:

> If applicable law permits the award of punitive damages and the arbitrator authorizes such an award, the parties agree that such award to any party shall not exceed $20,000 or five times the amount of compensatory damages awarded.

An accurate statement of the facts and evidence on record are given in the Fifth Circuit and district court opinions, which American Heritage incorporates by reference. *See Orr*, 294 F.3d 705; *Harmon v. American Heritage Life Ins. Co.*, 01-80 (N.D. Miss. June 28, 2001) (Reprinted in Pet. Appendix B ("Pet. App.") at 29a).

REASONS FOR DENYING THE WRIT

I. Petitioners Raise Narrow, State Law Issues That Lack Broad Impact or Application

Petitioners ask this Court to decide matters that pertain almost solely to state law. These matters have

limited or no application outside the state of Mississippi and do not warrant Supreme Court review. A review of the Petition demonstrates that the main issue presented for review is whether an opinion of the Mississippi Commissioner of Insurance ("Commissioner"), expressed in an affidavit obtained for litigation, is sufficient to invoke reverse-preemption under the McCarran-Ferguson Act.

Throughout this case, Petitioners attempted to defeat arbitration by focusing on their theory that insurers cannot avail themselves of arbitration agreements because according to Petitioners, it is unlawful to arbitrate insurance matters in Mississippi. This allegation is not supported by any Mississippi statute, case, or law. Petitioners argue that the Mississippi Department of Insurance and the Mississippi Insurance Commissioner had not, and would not, approve arbitration agreements in insurance policies. Petitioners base this argument on a single affidavit by the Commissioner stating that he does not approve arbitration agreements in insurance contracts.[1] Thus, according to Petitioners, American Heritage, an insurance company, cannot enforce arbitration. Petitioners' contention lacks basis not only in statute and precedent, but also in reason.

Petitioners' argument ignores the fact that the arbitration agreements at issue are located in various loan agreements between Fidelity and Petitioners, not in

[1] Petitioners fail to note, however, that this affidavit was obtained from the Commissioner in anticipation of litigation. Petitioners also ignore the fact that the Commissioner subsequently permitted arbitration agreements in insurance contracts, in direct contradiction of the affidavit Petitioners submitted in this action.

insurance contracts. Petitioners erroneously insinuate that American Heritage furtively associated itself with the arbitration agreements at issue. Petitioners seize upon the irrelevant fact that in accord with Mississippi insurance law, First Colonial filed an insurance proposal that contained an arbitration agreement with the Department of Insurance. The Department of Insurance informed First Colonial that approval of the insurance proposal required that any arbitration agreement be mutually agreed upon and non-binding. Petitioners allege that because the Department of Insurance did not approve this insurance proposal, American Heritage found other avenues to arbitration. According to Petitioners, the action by American Heritage to compel arbitration through the third-party agreement is an attempt "to do something the Mississippi Insurance Commissioner would not allow." (Pet. at 7). Not only have both lower courts rejected this theory, these allegations are irrelevant to this dispute.

Petitioners' theory focuses on these irrelevant facts in an attempt to avoid the truth – Petitioners willingly and knowingly executed arbitration agreements with Fidelity that provided for arbitration of any and all claims relating to the loan or credit insurance purchased in connection with the loan. American Heritage has every right to compel arbitration through this third-party agreement because Petitioners allege substantially interdependent and concerted misconduct by both American Heritage and Fidelity. In particular, Petitioners allege that the Respondents colluded and conspired to sell insurance. (Pet. App. at 32a). Accordingly, both lower courts held that *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000), *cert. denied,* 531 U.S. 1013 (2000), entitles American Heritage to compel arbitration of Petitioners' claims

against them because the claims are intertwined with the claims against Republic Finance. *Orr*, 294 F.3d at 706; *see also* (Pet. App. at 32a).

Petitioners cannot avoid the obvious. Petitioners have not, and cannot, cite a single Mississippi law that prevents insurance companies from enforcing arbitration agreements in loan documents, let alone a Mississippi statute that prevents arbitration of insurance-related disputes. Thus, Petitioners have not met the high standard necessary to invoke reverse-preemption under the McCarran-Ferguson Act.

A. The McCarran-Ferguson Act Does Not Apply To This Case

Petitioners argue that the FAA is inapplicable to the arbitration agreements because the McCarran-Ferguson Act reverse-preempts the FAA. Petitioners present no support for this argument. The McCarran-Ferguson Act reverse-preempts the FAA "only in the context of a state statute evincing the same, not mere policy statements of state officials or administrative rule interpretations of governmental entities." *Orr*, 294 F.3d at 708 (citing *Miller v. Nat'l Fidelity Life Ins. Co.*, 588 F.2d 185, 196-197 (5th Cir. 1979)). Petitioners have not and cannot identify a single statute that prohibits arbitration of insurance-related matters. Therefore, Mississippi law is not impaired, invalidated or superseded by compelling arbitration pursuant to the FAA. As the Fifth Circuit found, because Petitioners lack the necessary foundation – a specific state statute – upon which to predicate their McCarran-Ferguson argument, Petitioners "try to perpetrate a judicial end-run by asserting that an attorney

general's opinion or insurance department's regulatory, administrative policy is the functional equivalent of a state law relating to insurance, thereby triggering the provisions of the Act." *Id.*

To this end, Petitioners erroneously contend that Mississippi law precludes arbitration of insurance matters, because:

1. Mississippi law grants the Mississippi Insurance Commissioner power to regulate the insurance business in Mississippi;

2. An affidavit obtained by Petitioners for litigation purposes from the Commissioner states that the Commissioner does not allow arbitration provisions in insurance agreements;

3. Correspondence between First Colonial and the Department of Insurance rejected an arbitration agreement proposed by First Colonial; and,

4. Mississippi law deems it unlawful to use policies rejected by the Commissioner.

Even assuming *arguendo* that these facts are true, clearly, these four items are insufficient to invoke reverse-preemption under the McCarran-Ferguson Act. Petitioners' reliance on these facts demonstrates that Petitioners do not, cannot, and have not identified a single Mississippi law that "addresses, much less prohibits or restricts arbitration of credit-related claims." *Orr*, 294 F.3d at 709. Therefore, neither these facts nor Petitioners' argument as a whole, trigger reverse preemption under the McCarran-Ferguson Act.

Petitioners proffer Title 83 of the Mississippi Code, in its entirety, in an effort to satisfy the well-settled standard necessary to invoke reverse-preemption. Miss. Code. Ann. § 83, *et. seq.* (1972), *see also* (Pet. at 6). Petitioners' argument is wholly without merit. Neither American Heritage nor the lower courts have ever disputed that Mississippi has set out to regulate insurance in Title 83. Both American Heritage and the lower courts have, instead, noted that nothing in Title 83 indicates, let alone states, that Mississippi prohibits arbitration of insurance-related matters. Consequently, despite their contention, Petitioners present no evidence of any state law that would be "eviscerated" by application of the FAA. In fact, Petitioners admit that the McCarran-Ferguson Act does not reverse-preempt when the statutory provision relied upon is "mere pretense." (Pet. at 11) (citing *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564 (E.D. Pa. 1974)). As the Fifth Circuit found, Petitioners' attempted reliance on the entire Mississippi Insurance Code and the Commissioner's purported opinion is subterfuge – an attempt to mask the simple fact that no Mississippi statute prohibits arbitration of insurance-related matters. *Orr*, 294 F.3d at 708.

Moreover, Petitioners' entire McCarran-Ferguson argument is based on a factual mischaracterization. The Commissioner's affidavit relates to arbitration within insurance contracts, whereas the arbitration agreements in this case are in various loan agreements. This distinction illustrates that the Commissioner's affidavit, at most, expresses only an opinion that insurance contracts cannot

contain arbitration agreements.[2] More importantly, the Commissioner's affidavit does nothing to prove that it is unlawful for an insurer to enforce an arbitration agreement contained in another party's contract.[3] This is particularly obvious because the Commissioner subsequently allowed insurance policies to include arbitration agreements. Based on this allowance, Petitioners' theory that insurers cannot compel arbitration through third-party contracts lacks any legal or rationale support. As previously stated, American Heritage was not a party to the arbitration agreement at issue. Instead, American Heritage's association with the contract derives from Petitioners' claims of substantially interdependent and concerted misconduct between American Heritage and Fidelity. Accordingly, Mississippi insurance law is in no way implicated and any discussion of Mississippi insurance law related to this arbitration agreement is misplaced.

Consequently, review of this dispute must focus solely on whether any Mississippi law prohibits arbitration of insurance-related claims. Both lower courts conducted thorough reviews of Mississippi law and held that no such law exists. Further review of Mississippi law would in no way provide extensive application for disputes throughout the country. Therefore, American Heritage respectfully

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[2] The Commissioner later changed this opinion when he approved an insurance contract containing an arbitration agreement, submitted by Primerica Life Insurance Company. *See Orr*, 294 F.3d at 709.

[3] Even a cursory review of the countless, recent Mississippi federal court decisions permitting insurers to enforce arbitration agreements contained in loan agreements attests to the error of Petitioners' contention.

submits that this case does not raise issues appropriate for Supreme Court review.

II. Petitioners Raise Settled Issues

A. Petitioners Waived Their Right To A Jury Trial

The issue of whether signatories to an arbitration agreement have the right to demand and receive a jury trial, despite having waived such rights under an arbitration agreement, has been considered and settled by courts across the country. The Fifth Circuit considered and applied these laws. Petitioners raise no new considerations regarding the right to a jury trial in their Petition. Petitioners merely seek an alternate ruling under laws previously applied, in an attempt to evade arbitration.

In seeking further review of this issue, Petitioners struggle to minimize their decision to waive their right to a jury trial. In asserting the right to a jury trial, Petitioners ignore the undisputed fact that every Petitioner chose to execute arbitration agreements and accepted "clear and unmistakable, capitalized and boldfaced words which expressly waived their right to a jury trial." *Orr*, 294 F.3d at 711. Petitioners cite *East Ford v. Taylor,* No. 00-01527SCT, 2002 WL 1584301 (Miss. July 18, 2002), in an attempt to support the assertion that they are "entitled to a jury trial on the making of the arbitration agreements." (Pet. at 13). In fact, the *East Ford* decision actually advocates against Petitioners' assertion that they are entitled to a jury trial based on the indisputable distinctions between the *East Ford* arbitration agreement and the arbitration agreements at issue in this case.

First, the format of the agreement in *East Ford* is distinguishable from the format used in the arbitration agreements Petitioners executed. The *East Ford* arbitration agreement:

> is not in boldface and it appears less than one third the size of many other terms in the document. . . . the arbitration clause along with the additional terms and status and compensation clause are all in very fine print and regular type font. . . . The arbitration clause also does not have any underlining nor any other effect which would alert the reader of the importance of its terms.

East Ford, 2002 WL 1584301, at *4. In contrast, the arbitration agreements signed by Fidelity and Petitioners were in clear language and legible print. *Orr*, 294 F.3d at 705-706. "Directly above the date and signature lines, in bold, capital, readily legible letters" the arbitration agreements alerted Petitioners that they were "**GIVING UP THE RIGHT TO A TRIAL IN COURT, BOTH WITH AND WITHOUT A JURY.**" *Id.* at 705 (emphasis in original).

Second, the terms of the arbitration agreement used in *East Ford* are distinguishable from the terms of the agreements Petitioners executed. In the *East Ford* arbitration agreement:

> The administrators of the agreement do not have any authority to award punitive damages. The arbitration clause also states that the only claims which may arise among the parties which are not subject to this arbitration agreement are claims by East Ford, Inc. . . .

East Ford, 2002 WL 1584301, at *5. Again, the arbitration agreements in this case are significantly distinguishable. The agreements at issue authorize the arbitrator to award punitive damages. Additionally, the agreements do not allow either party to unilaterally rescind the agreement, but require all parties to arbitrate all claims. Further, any exceptions contained in the agreement, such as allowing bankruptcy, repossession, replevin, foreclosure, and collection suits, mutually apply to all parties.

The Mississippi Supreme Court relied heavily on the questionable format and terms of the *East Ford* arbitration agreement in holding the agreement procedurally unconscionable. In contrast, the arbitration agreements in this case include all of the elements the court found lacking in the *East Ford* agreement. The distinctions between the *East Ford* arbitration agreement and the agreements executed in this case illustrate that the agreements Petitioners executed are not unconscionable.

Further, having signed arbitration agreements, Petitioners are entitled to a jury trial only if they specifically attack the making of the arbitration agreements. *Orr,* 294 F.3d at 711 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967)); *See also Russell v. Performance Toyota,* 01-00832SCT, 2002 WL 31087644 (Miss. Sept. 9, 2002) (holding that procedural unconscionability attack on a contract containing an arbitration agreement is an attack on the formation of the contract generally). "It is well-established that '[a] party to an arbitration agreement cannot obtain a jury trial merely by demanding one.'" *Orr,* 294 F.3d at 711 (quoting *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 961 F.2d 1148, 1154 (5th Cir. 1992). Petitioners argue that the affidavits attack the "making" of the arbitration agreements. The

Fifth Circuit considered the affidavits, however, and ruled that Petitioners did not satisfy their burden of proving fraud in the making of the arbitration agreement. *Orr,* 294 F.3d at 710.

Specifically, the Fifth Circuit held that affidavits "proffered by [Petitioners] . . . amount to bald assertions that do not approach fraud in the 'making' of the agreements." *Id.* (citing *Bhatia v. Johnston,* 818 F.2d 418, 421-422 (5th Cir. 1987)). The Fifth Circuit also held that other than their "self-serving affidavits," Petitioners had not "submitted a whisper of evidence to support the conclusion that a jury trial is warranted." *Id.* Based on the Fifth Circuit's full review of the Petitioners' jury trial arguments, any issue regarding Petitioners' demand for a jury trial would simply be a review and application of well-settled precedent and would produce no new ruling.

B. The Cost Of Arbitration Is Not Prohibitive

Petitioners seek to avoid the arbitration agreements they executed by reference to the purported high costs of arbitration. Petitioners fail, however, to provide any evidence to support this contention. Petitioners' argument ignores the following facts regarding costs: (1) the arbitration agreement incorporates the AAA rules allowing the arbitrator to defer, reduce, or potentially eliminate the administrative fees in the event of extreme hardship on the part of any party; (2) the arbitration agreement expressly provides that the lender will pay all arbitration fees and expenses for up to one day of the proceedings, excluding the initial $125 fee; and, (3) the arbitration expressly provides that any other costs shall be paid by the non-prevailing party. *See Orr*, 294 F.3d at 712.

Issues regarding arbitration costs have been considered and settled by courts across the country. The Fifth Circuit applied these laws in its analysis of arbitration costs and concluded that Petitioners failed to show any likelihood that they would incur costs that would prohibit Petitioners from arbitrating their claims. *Orr*, 294 F.3d at 711-712 (citing *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79 (2000)). The Fifth Circuit held that "the mere fact that [Petitioners] face the possibility of being charged arbitration fees, including paying the arbitrator's fee if directed to do so by the arbitrator, does not render the Agreements unenforceable." *Id.* Petitioners present no new evidence to warrant overruling this decision.

Regardless of the caricature painted by Petitioners in their Petition, the facts demonstrate that the arbitration agreement at issue adopts the fair and accepted fee schedule set forth by the American Arbitration Association. Furthermore, both the AAA rules and the plain language of the arbitration agreement provide for a just allocation of arbitration costs. First, under Rule 51 of the Commercial Dispute Resolution Procedures, "[t]he [American Arbitration Association] may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees." *See Orr*, 294 F.3d at 712. Second, the arbitration agreement expressly provides:

> The party requesting arbitration shall at that time pay the arbitrator $125.00. Lender shall pay arbitrator all other arbitration fees and expenses costs up to one day (8 hours) of proceedings. Any other such costs shall be paid by the non-prevailing party.

See Orr, 294 F.3d at 712. Under these provisions, Petitioners incur no costs unless the proceedings extend past one day and the Petitioners lose. In any event, Petitioners could petition the AAA to defer or reduce the fees. Importantly, Petitioners present no foundation for the calculation of arbitration fees and costs used in their Petition. (Pet. at 14). Accordingly, any argument that arbitration is too costly is simply unconvincing and unsupported by any evidence.

Petitioners' citation to *Shankle v. B. G. Maint. Mgmt., Inc.*, 163 F.3d 1230 (10th Cir. 1999) and *Cole v. Burns Int'l. Sec. Serv.*, 105 F.3d 1465 (D.C. Cir. 1997) does nothing to save their unsupported allegation that arbitration is too costly. (Pet. at 14). No one disputes the mere fact that many "courts have held arbitration agreements unenforceable because the costs were too high." *Id.* In these cases, however, the parties met their burden of demonstrating that the cost of arbitration would effectively eliminate their right to adjudication of their claims.

In *Cole*, the court noted that Cole's employment was conditioned on acceptance of an arbitration agreement requiring arbitration. *Cole*, 105 F.3d at 1483-1484. Cole demonstrated that there was no indication that arbitration fees could be reduced or waived for financial hardship and that the agreement did not state who would pay the fee. *Id.* Accordingly, the Court held that the cost of arbitration would likely be prohibitively expensive for an employee like Cole. *Id.* Likewise, in *Shankle,* Shankle presented adequate proof to demonstrate that the agreement effectively required him to agree to arbitrate as a term of continued employment, yet failed to provide a forum for disputes because he could not afford the

arbitration fees. *Shankle v. B. G. Maintenance Management, Inc.*, 163 F.3d at 1235.

In contrast, whereas American Heritage and Fidelity demonstrated several reasons why the costs of arbitration are not prohibitive, including the fact that arbitration costs can be reduced, deferred, or potentially eliminated, Petitioners present no evidence to the contrary. Petitioners instead rely on possible "likelihoods" and assertions that they "may eventually have to pay a portion of arbitrator's fees." (Pet. at 14); *Orr*, 294 F.3d at 712. "Without more, the mere possibility that a party may have to share in the payment of the arbitrator's fees is not a sufficient reason to invalidate an arbitration agreement." *Orr*, 294 F.3d at 712, (citing *Williams v. Cigna Fin. Advisors*, 197 F.3d 752, 764-765 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000)). Consequently, Petitioners' bare allegations relating to arbitration costs fail to show any likelihood that they will be effectively precluded from arbitrating their claims. Therefore, Petitioners fail to meet their burden of proof as set forth by this Court in *Green Tree Fin. Corp. - Ala. v. Randolph* and the agreements are enforceable.

III. The Fifth Circuit Opinion Is Not A Contradiction

Petitioners' allegation that the Fifth Circuit's opinion is a contradiction stems from their gross misstatement of the questions presented. The Fifth Circuit did not hold that "the Commissioner does not have the power to prevent arbitration agreements in their insurance products." (Pet. at *i*). The arbitration agreements at issue are contained in various loan agreements, not insurance policies. Therefore, even a simple review of the Fifth Circuit's

Opinion demonstrates no contradiction exists. In its opinion, the Fifth Circuit stated:

> because no Mississippi statute addresses, much less prohibits or restricts, arbitration of credit insurance-related claims, disputes or controversies, the Commissioner of Insurance for the State of Mississippi (the "Commissioner") is without regulatory authority to prohibit arbitration clauses relating to insurance.

Orr, 294 F.3d at 708-709. In other words, the mere fact that the Commissioner may permit or disallow arbitration clauses in insurance policies does not grant him the power to prohibit arbitration of all insurance matters.

Furthermore, the fact that the Commissioner had not approved arbitration clauses in insurance policies when this action commenced does not support Petitioners' theory that the use of mandatory, binding arbitration agreements contained in third-party contracts is unlawful in Mississippi. Even if this fact did support Petitioners' theory, during litigation of this action, the Commissioner approved an arbitration agreement contained in an insurance policy.[4] This approval demonstrated that Mississippi

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[4] Petitioners erroneously allege that the press release announcing the Commissioner's allowance of arbitration agreements in a Primerica Life Insurance contract was not in the record. (Pet. at 10-11). The error of Petitioners' allegations is evidenced by the Fifth Circuit's Opinion, which specifically states, "*As the record indicates*, Appellants' contention that the Commissioner never permits insurance disputes to be subject to arbitration is incorrect. *The record indicates* that the Commissioner can permit or disallow insurance disputes to be subject to arbitration as the Commissioner deems fit." *Orr*, 294 F.3d at 709 (emphasis added).

law does not prohibit arbitration of insurance matters, otherwise the Commissioner's approval itself was unlawful. Further, this approval demonstrated the fallacy of relying on an unsupported affidavit by the Commissioner, which is predicated upon a Mississippi Attorney General opinion that explicitly states that the FAA was not referenced. Accordingly, the contradiction present in this dispute is located in Petitioners' argument, rather than the Fifth Circuit's opinion.

IV. The Fifth Circuit Opinion Does Not Conflict With Other Circuits

In a hollow attempt to satisfy the standard needed to obtain a writ, Petitioners try to construct a conflict of opinions between the circuits. Petitioners point to three cases in arguing that the Fifth Circuit decision conflicts with decisions in other circuits. (Pet. at 10-11). While there have been countless decisions in other circuits that deal with arguable conflicts between federal law and state insurance law, the simple fact that other decisions deal with state insurance schemes proves nothing. In each of the cases cited by Petitioners, the parties and the courts point to specific provisions of a state regulatory scheme that would be invalidated if the McCarran-Ferguson Act were not applied. In contrast, in this action, Petitioners "fail to identify any statute that would be impaired, invalidated, or superseded by the application of the FAA." *Orr*, 294 F.3d at 708.

For example, in *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1307-1308 (8th Cir. 1997), the Eighth Circuit concluded that the McCarran-Ferguson Act barred application of RICO laws because the unique nature of

RICO laws, although parallel to specific Minnesota laws, differed in availability and the magnitude of remedies provided and could impair Minnesota's regulatory scheme. In *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 705 (10th Cir. 1988), *cert. denied,* 489 U.S. 1096 (1989), the Tenth Circuit ruled that the district court should have abstained from hearing the action because Oklahoma insurance law explicitly provides for a particular state court to oversee liquidation of insolvent insurers under the Uniform Insurers Liquidation Act. In *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564 (E.D. Pa. 1974), the Pennsylvania district court held that the McCarran-Ferguson act exempted plaintiffs' rate fixing allegations from the Sherman Act. The court noted numerous statutory and regulatory provisions discussing and setting forth Pennsylvania insurance rate law. *Id.*

A key distinction in each of the above-cited cases is the ability to point to specific state laws that would have been invalidated had the courts not applied the McCarran-Ferguson Act. Unlike these cases, the Petitioners have not and cannot identify a single Mississippi law that will be invalidated by applying the FAA. Therefore, the Fifth Circuit's opinion is directly in line with that of other circuits holding that the McCarran-Ferguson Act is only applicable when a state insurance law would be invalidated, impaired, or superceded. Consequently, no conflict between the Fifth Circuit's opinion and other circuits exists.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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